

Date: August 28, 1997

Case No.: 95-INA-253

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT,
Employer

On Behalf Of:

ROSA M. DOMINGUEZ MANCILLAS,
Alien

Appearance: Susan M. Jeannette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 25, 1993, Alberto's Mexican Restaurant ("Employer") filed an application for labor certification to enable Rosa M. Dominguez Mancillas ("Alien") to fill the position of Cook (AF 240-241). The job duties for the position are:

Cook for authentic Mexican restaurant with recipes passed through the family for generations. Must be able to use standard restaurant equipment and utensils. Able to prepare a wide range of Mexican foods including tacos, tostados, burritos, rice beans, chile releno, carnitas, carne asada, machacha, etc. Garnish with lettuce, tomatoes, guacamole and salsa. This schedule allows for a thirty minutes meal break. Responsible for scheduling within his shift and control and recording all inventory with respect to foods and paper products used during the shift.

The requirements for the position are eight years of grade school and two years of experience in the job offered or in the related occupation as a Mexican restaurant cook. Other Special Requirements are:

Must speak Spanish, as the crew only speaks Spanish and many of the customers only spak [sic] Spanish. Must have passed Foodhandler's exam. Must pass drug testing if hired.

The CO issued a Notice of Findings on April 12, 1994 (AF 228-238), proposing to deny certification on the grounds that the Employer has failed to document: (1) that it has a *bona fide* job offer; (2) the actual minimum requirements; (3) that the job is truly open to U.S. workers; (4) that U.S. workers were contacted timely and rejected for job-related reasons; (5) that the foreign language requirement is not unduly restrictive; (6) that the advertisement described the job with specificity; and, (7) that the application has been completed. Specifically, the CO has found no evidence that Employer can afford to put the Alien on the payroll at the offered wage of \$8.00 per hour, as required by 20 C.F.R. §§ 656.3 and 656.20(c)(4). Next, the CO determined that the Employer's requirement for two years of experience does not appear to meet the Employer's true minimum requirements, as required by 20 C.F.R. § 656.21(b)(5), as there is no evidence that the Alien has two years of experience. Also, the CO is not convinced that the Employer is a separate business from a former Alberto's Mexican Restaurant located in Poway, where the Alien allegedly gained experience. The CO also found no clear opening for U.S. workers in violation of 20

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

C.F.R. § 656.20(c)(8), and stated that it appears that the Alien appears to have a “determining influence in assessing the qualifications of any U.S. worker who might apply.”

The CO next stated that the Employer unlawfully rejected U.S. applicant Enrique Larios in violation of 20 C.F.R. § 656.21(b)(6). Mr. Larios appears to be qualified based on his application which indicates 13 years of experience as a cook and that he is bilingual. The Employer rejected him after he failed to show up for an interview. The CO determined that there was no evidence provided to show that this applicant was given sufficient time to make arrangements to attend the interview or to reschedule the interview, and the Employer apparently made no further attempt to contact him or attempt to recruit him. The CO found that the Employer did not demonstrate a good-faith effort to contact U.S. applicants in a timely manner. *Loma Linda Foods, Inc.*, 89-INA-289 (Nov. 26, 1991) (*en banc*).

Next, the CO found that this occupation does not normally require a foreign language, and the Employer’s requirement of such is in violation of 20 C.F.R. § 656.21(b)(2)(i)(c) unless the foreign language requirement is documented to be business necessity or a customary requirement for such employment in the United States. The CO stated that:

The petitioning employer is a Mexican Restaurant in San Diego, California, which is a small establishment having had only about two employees. The area in which the restaurant is located is known to be English speaking. The ETA 750 A form, item 15, states that the Spanish language is required because the crew only knows Spanish and many customers only speak Spanish.

The CO stated that he was not persuaded that the employees do not speak English well enough to perform their job duties under the cook’s supervision, nor was he persuaded that there is extensive non-English speaking customers or that the cook must have an ability to converse with non-English speaking customers. Then, the CO found the Employer in violation of 20 C.F.R. § 656.21(g), as the advertisement lacks specificity in that the advertisement stated that the job opportunity was at two locations including Poway and Escondido, not the stated address on the application form. Lastly, the CO noted that the ETA 750B form only lists the Alien’s experience from January 1990 through January 1992, instead of the prior three years as required.

Accordingly, the Employer was notified that it had until May 17, 1994, to rebut the findings or to cure the defects noted. A request for extension of time was submitted by the Employer on April 20, 1994 (AF 227), which was granted by the CO on April 26, 1994, allowing until June 21, 1994, to submit rebuttal (AF 226).

In its undated rebuttal (AF 47-222), the Employer contended that it is now “very successful” and needs three cooks and nine other workers to cover three shifts, as opposed to when it first opened and was unable to afford full-time employees. The Employer stated that it plans to expand to several more locations in the area. The Employer contended that the Alien was not on the payroll records for Alberto’s Mexican Restaurant in Escondido because she “did not have any papers,” was “not legal to work,” was paid in cash, and “was not shown on the payroll because they are now just coming into compliance with the law.” The Employer stated that the Alien has the two years of required experience. The Employer further contended that the

job was readvertised but no one applied for it, as well as a job posting at the place of employment which no one applied for.

The Employer next contended that the Alien will supervise up to three “intended” employees, and \$8.00 per hour is consistent with the job opening. The Employer stated that the Alien has no ownership interest of any kind, and he has no authority to hire or fire employees and will only supervise “potential kitchen employees.” Regarding U.S. applicant Enrique Larios, the Employer stated that he had sufficient notice of the interview and the Employer also made several attempts to reschedule the interview but was unsuccessful. The Employer further asserted that it did demonstrate a good-faith effort to contact the U.S. applicants in a timely manner.

Next, the Employer contended that the foreign language requirement is a business necessity and Spanish is a customary requirement for such employees in the United States. The Employer stated that the bulk of its customers do not speak English and the owner, herself, only speaks Spanish. The Employer stated that:

The OSHA regulations require the people that supervise speak the same language as those supervised. The supervised employees speak no English, most have no high school, and communicate in Spanish only.

The Employer next claimed that the advertisement was again listed and the specificity requirement was met. Finally, the Employer submitted a completed ETA 750B, listing all experience for the Alien for the prior three years.

The CO issued the Final Determination on August 23, 1994 (AF 42-46), denying certification because the Employer’s rebuttal has been found to be unpersuasive regarding several issues. First, the Employer remains in violation of 20 C.F.R. § 656.21(b)(5) as the Employer has neither deleted the requirement for two years of experience, nor has it justified the requirement. Second, the CO determined that the Employer remains in violation of 20 C.F.R. § 656.3 and § 656.20(c)(4), regarding whether a *bona fide* job exists and the Employer’s ability to pay the offered salary. The CO found that none of the information provided by the Employer documents that it can afford to hire three full-time cooks. Additionally, there is no information that each cook would supervise three other employees. Third, the Employer remains in violation of 20 C.F.R. § 656.20(c)(8), as the job does not appear to be truly open to U.S. workers. The CO stated that:

Where the alien is being offered a higher wage than the employer has paid, and will supervise more employees than have so far been acknowledged, and the alien has the same last name as the employer, the alien’s relationship to the owner and whether the job is truly open was questioned.

The CO stated that there is no clear evidence to show the relationship between the Alien and the Employer’s Owner, or how the job is truly open. Fourth, the Employer remains in violation of 20 C.F.R. § 656.21(b)(6) regarding the unlawful rejection of a U.S. applicant. The CO determined that U.S. applicant Enrique Larios is qualified and was not recruited in good faith or rejected for any lawful, job-related reasons.

On September 28, 1994, the Employer filed a Motion for Review of Final Determination (AF 4-41). Then, on October 25, 1994, the Employer filed a Motion to Remand (AF 1-3). In January 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”). On February 3, 1995, the Employer again submitted a Motion to Remand, and again on November 6, 1995, the Employer filed a Motion to Remand to Certifying Officer for Reconsideration.

Discussion

Section 656.21(b)(5) requires an employer to document either: (1) that the requirements it specifies for a job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience for jobs similar to the one offered; or, (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. Thus, an employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio’s Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991). The purpose of this section is to prevent employers from requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer may not treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

In this case, the CO, in accordance with § 656.21(b)(5), instructed the Employer to document that its two years of experience requirement for the job opportunity represents the Employer’s actual minimum requirements for the job opportunity (AF 230-231). Specifically, the CO questioned whether the Alien has the requisite two years of experience and, if so, whether he gained such experience while employed by a different employer. Accordingly, the CO gave the Employer three options to correct this deficiency. First, the CO instructed the Employer that it could delete the experience requirement and retest the labor market. Second, the CO stated that the Employer could provide evidence that the Alien gained two years of experience with a different employer. Third, the CO gave the Employer the option of providing evidence that it is not now feasible to hire an individual with less than two years of experience.

It is not clear from the Employer’s rebuttal which option she chose. There is some indication that the Employer attempted to readvertise the job opportunity. For instance, the Employer stated in her rebuttal that “the job was re-advertised and no one applied. Evidence of re-advertisement has been forwarded. The job was also posted in the restaurant according to the law.” (AF 49). In addition, there is a handwritten note on a copy of the NOF stating “we have readvertised and no one appeared.” (AF 131). However, there is no evidence that the Employer actually readvertised the job opportunity without the two-year requirement.² The CO informed the Employer that, if she chose to delete the requirement and readvertise, she must submit a signed statement to this effect (AF 231). The record does not contain any indication that the

² We note that the Employer’s rebuttal includes a recruitment report dated January 15, 1994, from the Employer (AF 11), as well as responses to the original advertisement placed November 17 through November 19, 1993 (AF 114, 117). However, this evidence pertains to the original advertisement which included the two years of experience requirement and, therefore, is not relevant here.

Employer intended to delete the two-year requirement. Moreover, the Employer did not provide any tearsheets from an advertisement. Thus, we find that this evidence is insufficient to show that the Employer readvertised the job opportunity at issue in this case.

There is also some indication that the Employer was attempting to show that the Alien possesses two years of experience which she acquired while working with a separate entity. For instance, the Employer stated that,

The payroll records for Alberto's in Escondido did not show the alien's name because the alien did not have any papers (employment authorization); was not legal to work; WAS PAID IN CASH; and was not shown on the payroll because they are now just coming into compliance with the law.

(AF 48).³ However, both the Alien's signed statement of work experience (AF 253), as well as a statement from Tony Contreras (AF 144),⁴ indicates that the Alien gained her alleged experience while working at an Alberto's Restaurant in Poway, California, not Escondido as the Employer suggests in her rebuttal. Thus, we find that the Employer's statement is not credible. In order to prove that the alien gained his/her qualifying experience with a different employer, the employer must demonstrate that its ownership and control are separate and distinct from the company where the alien gained his/her qualifying experience. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 90-INA-200 (May 23, 1991). In this case, Employer has not submitted any evidence that the Alien obtained the requisite experience while working for a separate and distinct business.

Accordingly, we find that the Employer has not readvertised and retested the labor market. Moreover, the Employer has not sufficiently documented that the Alien gained the requisite experience while employed by a separate and distinct entity. As such, the CO's denial of labor certification is hereby **AFFIRMED**.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

³ An unsigned statement from Tony Contreras dated May 6, 1994, further states that, "[t]he fact that the alien's are not listed on the payroll records is due to the fact that they did not have valid social security numbers, and could not be placed on the payroll as such. . . ." (AF 118-119). Moreover, in view of the findings made herein, we do not decide whether experience gained while an alien does not have legal status to work in this Country can be used as proof of requisite experience.

⁴ It is not apparent from this statement Mr. Contreras' connection to the Employer. However, an unsigned statement dated May 6, 1994, from Mr. Contreras states that he is the appointed administrator for each independently owned Alberto's restaurant (AF 130).

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.